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NINGKAN UMU

v.

SURUHANJAYA PERKHIDMATAN AWAM MALAYSIA

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HIGH COURT SABAH & SARAWAK, KUCHING

IAN HC CHIN J

[SUIT NO: S-KG 103-91]

27 NOVEMBER 1998

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PUBLIC SERVANTS: *Dismissal - Reasonable opportunity to be heard - Whether must be heard in mitigation before dismissal - Whether oral hearing necessary - Letter requesting plaintiff to make representation to explain why he should not be dismissed or reduced in rank - Dismissal upon non-acceptance of representations - Whether fair opportunity to be heard given - Federal Constitution, art. 135(2)*

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The plaintiff, a public servant, took out a writ against the Public Service Commission ('the defendant') claiming for reinstatement to his job without loss of seniority, salary and pension and for damages arising from his dismissal which he claimed was unlawful.

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The defendant, acting on a report it had received, served the plaintiff with a letter requesting him to answer two charges of absenteeism without leave or approval from his head of department. The letter stated that the plaintiff had the right to make written representations as to why he should not be dismissed or reduced in rank. Although the plaintiff put in his written representations,

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he was dismissed as the defendant felt that his representations failed to exculpate himself. The plaintiff contended that his dismissal was unlawful on the sole ground that he was not heard in mitigation before he was dismissed.

Held:*g*

[1] The issue of whether a public servant has been given a reasonable opportunity of being heard before being dismissed or reduced in rank is dependent on whether the prescribed proceedings or procedure that was employed against the public servant conformed to the requirements of art. 135(2) of the Federal Constitution.

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[2] No oral hearing is required by art. 135(2) of the Federal Constitution but the authority must act fairly, and what is fair depends on the circumstances.

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[3] The letter served by the defendant on the plaintiff required the plaintiff not only to answer the charges but also to state why he should not be dismissed or reduced in rank. He had therefore been given the opportunity to be heard which was fair in the circumstances of the case.

[4] The process where another hearing is required to enable the person to make representations before punishment is meted out is known only to a criminal trial. a

[Claim dismissed with costs.]

Cases referred to: b

Alan Noor Kamat v. Inspector General of Police & Anor [1987] 1 CLJ 51 (*refd*)
High Commissioner for India v. IM Lall [1948] PC 121 (*dist*)
Mahadevan v. Anandarajan & Ors [1974] 1 MLJ 1 (*refd*)
Najar Singh v. Government of Malaysia & Anor [1974] 1 MLJ 138 (*aff*)
Utra Badi Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor [1998] 2 CLJ 306 (*not foll*) c

Legislation referred to:

Federal Constitution, art. 135(2)
Public Officers (Conduct and Discipline) (Chapter “D”) General Orders 1980, General Order 26 d
Civil Service (Classification, Control and Appeal) Rules [Ind], r. 55
Government of India Act 1935 [Ind], s. 240(3)

For the plaintiff - Trabawan Mandi; M/s Detta Samen & Co

For the defendant - Ahmad Razif Mohd Sidek FC

Reported by Cindy Chan e

JUDGMENT

Ian HC Chin J:

Introduction f

Ningkan Umu @ Victor (“the plaintiff”) took out a writ on 26 August 1991 against the Public Service Commission (“the defendant”) claiming for reinstatement to his job without loss of seniority, salary and pension and for damages arising out of his dismissal which he claimed is unlawful.

Facts Of Case g

The plaintiff joined the Customs Department in 1984 and was confirmed in 1985 and had since served in various places in Malaysia until he was dismissed by the defendant with effect from 7 May 1991. The dismissal came after various events and proceedings. h

The defendant served the plaintiff a letter dated 16 May 1990 under General Order 26 of the Public Officers (Conduct and Discipline) (Chapter “D”) General Orders 1980 requesting him to answer two charges that he absented himself from work without taking leave or approval from his head of i

a department, that is, (i) from 18 February 1989 to 31 May 1989 and (ii) from 7 August 1989 to 22 February 1990. The said General Order is in these terms:

b 26.(1) Where it is represented to, or is found by, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

c (2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in a rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

d (3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

e (4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

f (5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

g (6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determine, shall be required to appear before the Committee and exculpate himself.

h (7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

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(8) The Committee may permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission: **a**

Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented. **b**

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds. **c**

(10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report. **d**

(11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion -

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly; **e**

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act. **f**

The letter was issued by the defendant after considering the report it had received. The letter stated that the plaintiff has the right to make his written representation as to why he should not be dismissed or reduced in rank. The plaintiff put in his written representation dated 20 June 1990 to say he was absent from work from 24 April 1989 to 31 May 1989 due to unavoidable circumstances (“sebab yang tidak dapat dielakkan”) and that he had applied for unpaid leave for this period (24 April 1989 to 31 May 1989) *vide* his letter dated 22 June 1989. The plaintiff also said that he did apply for unpaid leave for 55 days (from 18 February 1989 to 22 April 1989) but such was not approved by his department *vide* a letter dated 4 July 1989. In respect of his absence during the period (ii), the plaintiff admitted that he was absent from work during that period without leave or approval from his department. He **g**
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a said he replied to various letters dated 25 August 1989, 9 October 1989 and 27 November 1989 by his letters dated 18 October 1989 and 19 December 1989 in which he explained his absence from work during the period from 7 August 1989 to 22 February 1990 was due to:

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- (i) unavoidable personal reasons;
 - (ii) his difficulty in performing his duties on account of his inability to adapt himself to the working environment since his transfer from Kuching to Penang;
 - (iii) personal and family problems which he had to handle that particular time.

c In the course of their consideration of the plaintiff's representation, the defendant, through the plaintiff's head of department, requested that the plaintiff go for a medical evaluation at the mental hospital but the plaintiff refused stating, in his letter dated 19 March 1991, that he did not suffer from any mental illness. The defendant then on 6 May 1991 made the decision that

d the plaintiff be dismissed with effect from 7 May 1991.

Whether The Plaintiff Should Be Heard In Mitigation In A Further Proceeding?

e At the hearing, Mr. Trabawan Mandi, learned counsel for the plaintiff, contended that the dismissal was unlawful because the plaintiff was not heard in mitigation. Therefore, whether the plaintiff should be heard in mitigation before the dismissal is the only issue that calls for consideration. For his argument, learned counsel relied on the case of *Utra Badi a/l Perumal v. Lembaga Tata tertib Perkhidmatan Awam & Anor.* [1998] 2 CLJ 306. In that

f case Vincent Ng J held that a similar show cause letter, where the alternative punishment of dismissal or reduction in rank was stated, required the court to give an opportunity to a person to mitigate on the punishment and that a failure to do so would render the dismissal null and void. The learned judge had relied on the following passage of Ajaib Singh J in *Alan Noor bin Kamat v. Inspector General of Police & Anor.* [1987] 1 CLJ 51:

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h ... After considering these explanations and having found that the plaintiff had failed to exculpate himself, it was incumbent upon the Inspector General of Police thereafter to give the plaintiff an opportunity to make a plea in mitigation on punishment. This right of the plaintiff to be heard in mitigation is implied in regulation 27 of the General Orders and in art 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard. He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in

i mitigation before any punishment is imposed on him?

That passage was disapproved by the Supreme Court ([1988] 1 MLJ 260), per Salleh Abas LP, in the following terms: **a**

As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated 14 May 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. If, however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as “This proceeding is taken against you with a view to dismissal or reduction in rank ...” or “This proceeding is taken under GOD 30 with a view to dismissal or reduction in rank” ..., or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed. **b**
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However, Vincent Ng J considered that passage to be *obiter* and he did not wish to adopt it but instead followed the Privy Council case of *High Commissioner for India v. I.M. Lall* [1948] PC 121. That case considered s. 240 of the Government of India Act 1935 which is in the following terms: **e**

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- (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty’s pleasure. **f**
- (2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.
- (3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him: **g**

Provided that this subsection shall not apply –

- (a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
- (b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause. **h**
- (4) ... **i**

- a* The facts of that case are these. In September 1937, the respondent received a letter from the Judicial Commissioner enclosing a letter from the Chief Secretary to the North-West Frontier Government. The Chief Secretary's letter informed the Judicial Commissioner that the Punjab Government had decided to hold a departmental enquiry under r. 55 of the Civil Service (Classification, Control and Appeal) Rules into the conduct of the respondent while stationed at Multan during 1935-36 and that eight charges had been framed against the respondent of which copies were enclosed. Rule 55 was in the following terms:

- c* Without prejudice to the provisions of the Public Service Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall
- d* be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the authority so directs, an oral enquiry shall be held. At that enquiry
- e* oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses called, as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof. This rule shall not apply
- f* where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged.

- g* The letter of the Chief Secretary asked that steps be taken to serve the charges on the respondent and that he should be asked to furnish within a reasonable time a written statement of his defence and to state whether he wished to be heard in person or not. The eight charges were divided into two categories,
- h* the first of which alleged improper favouritism or nepotism in connection with his relative; the second category alleged improper victimisation of certain of the junior officials who had protested against the attempted promotion of his relative by an order of the respondent in December 1936. At the end of each charge were indicated the witnesses or documents whereby it was proposed to attempt to prove the charge. There also appear two paragraphs which clearly
- i* related to all the charges and they state:

That the above facts and his failure to offer any sufficient explanation up to the present are sufficient to prove that he had abused his position as an officer entrusted with the power of appointment on behalf of the Crown to show favour to a relation of his to the detriment of other officials serving under him, in contravention both of the recognized principles governing the conduct of Government servants as well as of the express orders of Government, and that he further abused his position as an officer entrusted with powers of discipline over other officers of the Crown to persecute various persons who sought to protect their own interests in a legitimate manner.

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That he should show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government rules and conduct unbecoming of a member of the Indian Civil Service.

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The respondent put in his written statement in answer to the charges. A Mr. Anderson then conducted a departmental enquiry and he examined the respondent on 10 June 1938, in the course of which the respondent pleaded guilty to the first two charges, and, without any further examination of witnesses, he made his report on 9 August 1938. As regards the remaining six charges, he found them unproven, but he indicated that he had not been able to make a full enquiry, and that a longer investigation, including a fortnight at Multan, and a further examination of documents were desirable before coming to final conclusions. Mr. Anderson's report was not disclosed to the respondent, and the government appointed Mr. Brayne to complete Mr. Anderson's preliminary enquiry. Mr. Brayne took the matter up and wrote to the respondent on 17 November 1938. After various procedures, in which the respondent took part, and in the course of which the government refused to disclose Mr. Anderson's report to him, Mr. Brayne made his report on 24 January 1939 in which he examined in detail all the eight charges, and found that the nepotism was "complete and deliberate," and that the charges of victimisation were all fully proved. The records of the enquiry, including the reports of Mr. Anderson and Mr. Brayne were then sent to the Federal Public Service Commission by the Government of Punjab which expressed its opinion that the respondent should be removed from the Indian Civil Service but be given a compassionate allowance. The respondent made representations to the said commission to protest the enquiry procedure and to argue the merits. The said commission thereafter made the decision on 10 August 1940 that the respondent should be removed from the service and that he should be granted a compassionate allowance.

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When that case came before the High Court, it decided that s. 240(3) did not require two enquiries, one to establish guilt and the second to determine the appropriate punishment. In so concluding, the High Court said that since the person was aware from the very start of the enquiry that removal from service was one of the various actions that could be taken against him, he was showing

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a cause during the course of the enquiry against the proposed action. The case went on appeal and the decision of the High Court was reversed by the Federal Court (by a majority) which said this:

b It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases.

d In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed.

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The case then went on further appeal to the Privy Council where, at p. 126, that passage was approved in these words:

f [21] Their Lordships agree with the view taken by the majority of the Federal Court. In their opinion, sub-s. (3) of S. 240 was not intended to be, and was not, a reproduction of R. 55 which was left unaffected as an administrative rule. Rule 55 is concerned that the civil servant shall be informed "of the grounds on which it is proposed to take action," and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing; this is in marked contrast to the statutory provision of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him." In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-s. (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under R. 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.

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[22] On this view of the proper construction of sub-s. (3) of S. 240, it is not disputed that the respondent has not been given the opportunity to which he is entitled thereunder, and the purported removal of the respondent on 10th August 1940, did not conform to the mandatory requirements of sub-s. (3) of S. 240, and was void and inoperative. **a**

Thus, the Privy Council held that on a construction of the words “a reasonable opportunity of showing cause against the action proposed to be taken in regard to him” in s. 240(3) as requiring the affording of a two-stage opportunity, one in answering and defending the charges and the other of mitigating the punishment after the charges had been established. However, the words of art. 135(2), which are not similarly worded as s. 240(3), are in these terms: **b**

No member of such service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard **c**

If it was purely on a matter of construction of the words, I am of the view that I cannot follow the decision of *High Commissioner for India v. I.M. Lall* because the words of s. 240(3) and our art. 135(2) are different. Furthermore, the words in both s. 240(3) and art. 135(2) do not say that there should be the said two-stage proceeding. Therefore, whether a two-stage proceeding is required or not should not be the question, because no matter how you construe the words of s. 240(3) and art. 135(2) such a conclusion, as requiring the said two-stage proceeding, cannot be derived. The question, in my view, should instead, be whether the prescribed proceedings or procedure that had been employed against the plaintiff had conformed to the requirement of art. 135(2). In this regard, it has been held that no oral hearing was required by art. 135(2) but the authority must act fairly and that what is fair depends on the circumstances (*Najar Singh v. Government of Malaysia & Anor* [1974] 1 MLJ 138). **d**

The Federal Court in *High Commissioner for India v. I.M. Lall* appears to me, from the passage quoted *supra*, to be deciding that in some cases there would be compliance with s. 240(3) to indicate the charge, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. It will be recalled that the passage was approved by the Privy Council. This appears to me to support my view that the question is really whether the proceedings or procedure had been fair as to comply with s. 240(3). In that case, it will be recalled that the intimidation conveyed to the respondent was that he may be “dismissed, removed or reduced or subjected to such other disciplinary action”, more than just dismissal or reduction in rank, whereas in the present case only dismissal or reduction in rank was indicated. In my **e**
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- a* view, the present case would be sufficient compliance with art. 135(2) just as it would with s. 240(3). This was the view held by Salleh Abas LP, *supra*, which I would respectfully follow. In my view, the defendant's letter dated 16 May 1990 required the plaintiff not only to answer the charges but also to say why he should not be dismissed or reduced in rank. He had therefore
- b* been given the opportunity to be heard which was fair in the circumstances of this case.

- It must be noted that the process where another hearing is required to enable the person to make representation before the punishment is meted out is known only to a criminal trial whereas the process concerning dismissal of a civil
- c* servant is not such a criminal trial. This appears to be the view taken by *Najar Singh v. Government of Malaysia & Anor.*, which concerned the dismissal of a police officer, when it referred to, and implicitly approved of, *Mahadevan v. Anandarajan & Ors* [1974] 1 MLJ 1, which concerned the expulsion of a pupil, and where it was said that it was quite inappropriate to model the
- d* procedure on that of a criminal trial. Therefore, it would be inappropriate to require another hearing before the punishment can be meted out.

For the reasons stated I would, respectfully, decline to follow *Utra Badi a/l Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor.*

e **Conclusion**

In the premises, I would dismiss the plaintiff's claim with costs to the defendant.

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